

Dynamic Science, Inc. and District Lodge 12, Local Lodge 2424, International Association of Machinists and Aerospace Workers, Petitioner.
Case 5–RC–15189

June 27, 2001

DECISION ON REVIEW AND ORDER

**BY CHAIRMAN HURTGEN AND MEMBERS
LIEBMAN, TRUESDALE, AND WALSH**

On May 7, 2001, the Regional Director for Region 5 issued a Decision and Direction of Election (relevant portions of which are attached as an appendix) finding that the Employer's artillery test leaders are not supervisors within the meaning of Section 2(11) of the Act.

Thereafter, in accordance with Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Employer filed a timely request for review of the Regional Director's decision, contending that the test leaders are statutory supervisors because, inter alia, they use independent judgment in responsibly directing other employees.

On May 29, 2001, the Supreme Court issued its decision in *NLRB v. Kentucky River Community Care*, 121 S.Ct. 1861 (2001). In that case, the Court upheld the Board's Rule that the burden of proving Section 2(11) supervisory status rests with the party asserting it. However, the Court rejected the Board's interpretation of "independent judgment" in Section 2(11)'s test for supervisory status, i.e., that registered nurses will not be deemed to have used "independent judgment" when they exercise ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards. Although the Court found the Board's interpretation of "independent judgment" in this respect to be inconsistent with the Act, it recognized that it is within the Board's discretion to determine, within reason, what scope or degree of "independent judgment" meets the statutory threshold.

The Employer's request for review of the Regional Director's Decision and Direction of Election is granted as it raises substantial issues warranting review in light of the Supreme Court's decision in *Kentucky River*. Having carefully reviewed the entire record in light of *Kentucky River*, we affirm the Regional Director's finding that the Employer has failed to sustain its burden of establishing that the test leaders possess statutory supervisory authority in their direction of other employees.

The Employer's test leaders, along with the petitioned-for artillery testers, run tests of military artillery, weapons, and armaments for the United States Army. Each working day, a stipulated supervisor provides the test leaders with detailed assignment sheets. These sheets

detail the test leaders' daily activities, including: where he will report to carry out the testing; to whom he will be reporting; which testers will be on his crew; and what equipment he and his crew will be testing. Upon reaching the assigned site, the test leader checks in with the on-site test director, who provides additional instructions, such as what equipment needs to be set up and where exactly the test is to be executed. Depending on the equipment being tested, the test director will even specify the distance between the equipment and the target. In setting up the equipment, the leader and his crew are also required to follow written standard operating procedures that are provided by the manufacturer at each test site. Although the Employer's test leaders are responsible for the safe execution of the tests, it is uncontested that it is the responsibility of all the testers, as well as the test leaders, to stop the testing procedure and call the safety office should a safety violation occur.

Based on the foregoing, the Board agrees with the Regional Director's determination that the Employer has failed to sustain its burden of establishing that the test leaders possess statutory supervisory authority in their direction of other employees. The evidence shows that the test leaders' role in directing employees is extremely limited and circumscribed by detailed orders and regulations issued by the Employer and other standard operating procedures. Consequently, the degree of judgment exercised by the test leaders falls below the threshold required to establish statutory supervisory authority. See *Chevron Shipping Co.*, 317 NLRB 379, 381 (1995), cited with approval in *Kentucky River*.

ORDER

The Regional Director's Decision and Direction of Election is affirmed.

APPENDIX

DECISION AND DIRECTION OF ELECTION

District Lodge 12, Local Lodge 2424, International Association of Machinists and Aerospace Workers (the Petitioner or the Union) filed a petition seeking to represent a unit of all full-time and regular part-time artillery testers and artillery test leaders employed by the Employer at its Aberdeen Proving Grounds facility, Aberdeen, Maryland, but excluding all other employees, office clerical, professional, managerial, guards and supervisors as defined in the Act. The only issue raised at the hearing was whether artillery test leaders are supervisors within the meaning of Section 2(11) of the Act. The Employer contends that artillery test leaders are statutory supervisors, while the Petitioner contends that they are eligible employees.

The parties stipulated at the hearing that Program Manager Al Moran, and Range Supervisor Jerry Overbay are supervisors as defined under Section 2(11) of the Act. The parties stipulated Ruth Peterson is an office clerical who does not share a community interest with the petitioned-for unit and should be excluded from any unit found appropriate.

Employer's Operation

The Employer serves as a contractor to the United States Army at Aberdeen Proving Grounds where it performs tests on certain weapons. The weapons testing is performed by the artillery testers and the artillery test leaders.

Test Artillery Test Leaders

John Gillion has been employed as an artillery test leader for about 3 years. Prior to being an artillery test leader, Gillion was employed as an artillery tester. Gillion testified that he does not recall being provided any job description at the time he became a test leader and does not recall being told what his duties would be when he became a test leader. He reports every morning at 7 a.m. to Jerry Overbay, the range supervisor. According to Gillion, Overbay prepares a schedule each day for the work to be preformed. Gillion states during a typical day, he makes sure who is working with him that day, which is two or four people, and he checks with the test director concerning what needs to be done. According to Gillion, he then performs the test with the testers making sure everything functions in a safe manner. Gillion states he does not have the ability to hire, fire, promote, demote, or grant overtime to employees. In fact, Gillion states he spends almost all of his time performing the same work as testers. Gillion testified he is responsible for safety, but states that it is also the responsibility of any tester or test director to stop a safety violation when they see it. Gillion is not aware that he possesses any supervisory indicia.

Employer's Position

The Employer, who presented no witnesses with first-hand knowledge of the day-to-day duties performed by the artillery test leaders,¹ contends the artillery test leaders are supervisors based on the two documents attached hereto as Exhibits 1 and 2. Exhibit 1 is a page from the contract between the Army and the Employer, and Exhibit 2 is a three-page portion of the 1993 wage determination covering this job.²

Conclusions

Section 2(11) of the Act, 29 U.S.C. §152, provides:

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 2(11) is to be read in the disjunctive; the possession of any one of the authorities listed is sufficient to place an individual invested with this authority in the supervisory class. *Mississippi Power Co.*, 328 NLRB 965, 969 (1999), citing *Ohio Power v. NLRB*, 176 F.2d 385, 387 (6th Cir. 1949), cert. denied 338 U.S. 899 (1949). Applying Section 2(11) to the duties and responsibilities of any given person requires the Board to determine whether the person in question possesses any of the authorities listed in Section 2(11), uses independent judgment in conjunction with those authorities, and does so in the interest of management and not in a routine manner. *Hydro-Conduit Corp.*, 254 NLRB 433, 437 (1981). Thus, the exercise of a 2(11) authority in a merely routine, clerical, perfunctory, or sporadic manner does not confer supervisory status. *Chicago Metallic Corp.*, 273 NLRB 1677 (1985). As pointed out in *Westinghouse Electric Corp. v. NLRB*, 424 F.2d 1151, 1158 (7th Cir. 1970), cited in *Hydro Conduit*

Corp.: "the Board has a duty to employees to be alert not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied employee rights which the Act is intended to protect." See also *Quadrex Environmental Co.*, 308 NLRB 101, 102 (1992). In this regard, employees who are mere conduits for relaying information between management and other employees are not statutory supervisors. *Bowne of Houston*, 280 NLRB 1222, 1224 (1986).

In enacting Section 2(11), Congress emphasized its intention that only supervisory personnel vested with "genuine management prerogatives" should be considered supervisors, and not "straw bosses, leadmen, setup men and other minor supervisory employees." See S. Rep. No. 105 at 4, 80th Cong., 1st Sess., reprinted in 1 Leg. Hist. (LMRA 1947). The Board has long recognized "there are highly skilled employees whose primary function is physical participation in the production or operating processes of their employer's plants and who incidentally direct the movements and operations of less skilled subordinate employees," who nevertheless are not supervisors within the meaning of the Act, since their authority is based on their working skills and experience. *Southern Bleachery & Print Works*, 115 NLRB 787, 791 (1956), enfd. 257 F.2d 235 (4th Cir. 1958), cert. denied 359 U.S. 911; *Gulf Bottlers, Inc.*, 127 NLRB 850, fn. 3, 858-861 (1960), enfd. sub nom. *Brewery Workers v. NLRB*, 298 F.2d 297 (D.C. Cir. 1961); *Koons Ford of Annapolis*, 282 NLRB 506, 513-514 (1986), enfd. 833 F.2d 310 (4th Cir. 1987), cert. denied 485 U.S. 1021 (1988). See also *KGW-TV*, 329 NLRB 378 (1999) ("even the exercise of substantial and significant judgment by employees instructing other employees based on their own training, experience and expertise does not translate into supervisory authority responsibly to direct other employees").

The party seeking to exclude an individual from voting for a collective-bargaining representative has the burden of establishing that the individual is ineligible to vote. *Golden Fan Inn*, 281 NLRB 226, 229-230 fn. 12 (1986). As stated in *Ohio Masonic Home*, 295 NLRB 390, 393 (1989): "in representation proceedings such as this, the burden of proving that an individual is a supervisor rests on the party alleging that supervisory status exists. *Tucson Gas & Electric Co.*, 241 NLRB 181 (1979)." Accord: *Carlisle Engineered Products*, 330 NLRB 1359 (2000); *Fleming Cos.*, 330 NLRB 277 fn. 1 (1999); *Bennett Industries*, 313 NLRB 1363 (1994). Conclusory evidence, "without specific explanation that the [disputed person or classification] in fact exercised independent judgment," does not establish supervisory authority. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991). Similarly, it is an individual's duties and responsibilities that determine his or her status as a supervisor under the Act, not his or her job title. *New Fern Restorium Co.*, 175 NLRB 871 (1969).

The record establishes the artillery test leaders perform similar duties to the artillery testers. Moreover, the record is devoid of any evidence the artillery test leaders are supervisors within the meaning of Section 2(11) of the Act. The Employer's argument that the artillery test leaders are supervisors rests solely on a line in their contract with the Army and a second line in the 1993 wage determination to the effect that they have "experience leading" and "coordinate the efforts" of the crew. However, no evidence was presented that the actual duties of the artillery test leaders involved supervisory authority. In view of the foregoing, I find the artillery test leaders are *not* supervisors within the meaning of Section 2(11) of the Act and are *eligible* to vote in the election directed herein.

In summary, I direct an election in the following unit:

All full-time and regular part-time artillery testers and artillery test leaders employed by the Employer at its Aberdeen Proving Grounds facility, Aberdeen, Maryland, but excluding all other employees, office clericals, professionals, managerial employees, guards and supervisors as defined in the Act.

¹ The employer's sole witness was Richard Cheliras, director and division manager, general manager for the Defense Services Technical Division of Dynamic Science, Inc. Cheliras testified that the last time he observed artillery testers and artillery test leaders performing their jobs was in mid-October 2000, for about 10 minutes.

² Petitioner objected to the receipt of these exhibits for lack of a foundation. While the receipt of these documents in the record raise some issues, for the purposes of this decision, I have reviewed them and considered them to be what the Employer asserts they are, a portion of their current contract with the Army and a portion of the 1993 wage determination.